

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND TRANSMISSION SITING

In the Matter of:

THE APPLICATION OF KENTUCKY)
PIONEER ENERGY, LLC FOR A)
CONSTRUCTION CERTIFICATE) CASE NO. 2002-00312
PURSUANT TO KRS 278.704(1) TO)
CONSTRUCT A MERCHANT)
ELECTRIC GENERATING FACILITY)

Before: Martin J. Huelsmann, Chairman, Gary W. Gillis, Robert E. Spurlin, Henry List, J.R. Wilhite, James P. Kirby, and John R. Maruskin

O R D E R

On December 19, 2002,¹ Kentucky Pioneer Energy, LLC (Kentucky Pioneer) filed, pursuant to KRS 278.706(1), an application with the Kentucky State Board on Electric Generation and Transmission Siting (Board) for approval to construct a 540 megawatt (MW) electric power generation facility in Clark County, Kentucky.

PROCEDURE

On January 28, 2003, a procedural schedule providing for discovery, a local public hearing, an evidentiary hearing, and post-hearing briefs was established in this proceeding. On February 3, 2003, the Board granted the motion of East Kentucky Power Cooperative, Inc. (EKPC) for full intervention. Board Staff issued its first data

¹ Kentucky Pioneer originally filed its application on November 26, 2002. However, the Board did not deem the application administratively complete until December 19, 2002. See the Board s letter dated December 19, 2002.

requests to Kentucky Pioneer and EKPC on January 13, 2003 and February 11, 2003, respectively. Kentucky Pioneer filed its response on January 21, 2003, and EKPC filed its response on February 28, 2003. On February 6, 2003, Jason Associates Corporation, a Board consultant, submitted its Review and Evaluation of Kentucky Pioneer's Site Assessment Report. Another Board consultant, Commonwealth Associates, Inc., filed its Transmission System Review on March 3, 2003.

On March 4, 2003, in response to a request from Clark County Judge/Executive Drew Graham, the Board conducted a local public hearing at the Clark County Cooperative Extension Service. On March 11, 2003, Board Staff filed a written summary of comments received at the local public hearing.

The Board conducted an evidentiary hearing on March 6, 2003. Dwight Lockwood filed direct testimony on February 28, 2003 and testified on behalf of Kentucky Pioneer at the evidentiary hearing. Mary Jane Warner and David Drake testified on behalf of EKPC. All witnesses were subject to cross-examination. On March 24, 2003, Kentucky Pioneer filed its post-hearing brief and the matter was submitted to the Board for its review.

KENTUCKY PIONEER

Kentucky Pioneer is a Kentucky corporation principally located at 312 Walnut Street, Suite 2000, Cincinnati, Ohio. A wholly owned subsidiary of Global Energy, Inc., Kentucky Pioneer proposes to construct and operate a 540 MW electric gasification combined cycle generation station in Clark County, Kentucky. Kentucky Pioneer intends to build the facility within 300-acre parcel of land that it currently leases from EKPC. This parcel is wholly contained within a 3200-acre plot owned by EKPC at its

J.K. Smith site in Trapp, Clark County.² The proposed site is located approximately 8 miles southeast of Winchester, and 1 mile west of Trapp, Kentucky.³

The proposed generation station is comprised of three generators that will produce electricity and deliver it at 138 kilovolts to EKPC at an interconnect point located at the facility transformers.⁴ Natural gas will be used initially and as a back-up fuel for this project. The primary fuel will be synthesis gas, which will be produced by the chemical conversion of solid feedstock. According to Kentucky Pioneer, the solid feedstock will consist of coal and refuse-derived fuel pellets. These materials will be received by rail, unloaded, and maintained in covered storage before processing.

It is proposed that EKPC will interconnect with the plant via proposed transmission lines that EKPC will construct, own, and operate.

The project is proposed to be the first commercial application of fixed bed gasification technology in the United States.⁵

STATUTORY PROVISIONS

Pursuant to KRS 278.706(1), no person shall commence to construct a merchant electrical generating facility until that person has applied for and obtained a construction certificate for the proposed facility from the Board. KRS 278.710(1) directs the Board to consider the following criteria in rendering its decision: impact on scenic surroundings, property values, and surrounding roads; anticipated noise levels; economic impact upon

² Section 1.2 of Kentucky Pioneer Application.

³ Lockwood Testimony at 4.

⁴ Id.

⁵ Lockwood Testimony at 2.

the affected region; the existence of other generation facilities capable of generating at least 10 MW of energy; local planning and zoning requirements; potential impact upon the electricity transmission system; compliance with statutory setback requirements; efficacy of any proposed measures to mitigate adverse impacts; and history of environmental compliance. The Board may also consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation. KRS 278.710(2).

KRS 278.710(1) explicitly grants the Board the authority to grant or deny a certificate in whole or in part.

FINDINGS

After carefully weighing all of the factors outlined in KRS 278.710(1), the Board finds that Kentucky Pioneer has not satisfied the requirements set forth in the Board's enabling statute. Specifically, the Board finds that Kentucky Pioneer has not demonstrated that the proposed facility will meet all local planning and zoning requirements that existed on the date that the application was filed. Due to the fact that Kentucky Pioneer's application would have been administratively incomplete and thus could not even be reviewed without certification that it would meet all local planning and zoning requirements, the Board concludes that the issue of Kentucky Pioneer's subsequent repudiation of its statement of full compliance is dispositive. The application must, therefore, be denied.

At the close of the evidentiary hearing held on March 6, 2003, the Board asked Kentucky Pioneer to submit a post-hearing brief addressing the extent to which the proposed facility would meet all planning and zoning requirements that existed on the

date the application was filed. On March 24, 2003, Kentucky Pioneer submitted a brief which concluded that, because Kentucky Pioneer is exempt from the jurisdiction of the Clark County Planning and Zoning Commission (Planning Commission), the fact that Kentucky Pioneer proposes to construct and operate a generation facility in an area that is limited to agricultural use should not prevent the Board from finding that Kentucky Pioneer has met existing planning requirements.⁶ After carefully reviewing the Board's enabling statute, its legislative history, and basic rules of statutory construction, the Board determines that it cannot accept Kentucky Pioneer's assertion.

The provisions contained in KRS 278.700-278.716 (siting statute or statute) govern the siting of merchant electric generation facilities in Kentucky. This statute creates the Board⁷ and establishes certain guidelines and requirements that must be met before the Board can approve a proposed site. Before a final decision is rendered on a proposed facility, the statute directs the Board to consider whether the proposed facility will meet all local planning and zoning requirements.⁸

Kentucky Pioneer correctly asserts that public utilities regulated by either the Kentucky Public Service Commission (PSC) or by the Federal Energy Regulatory

⁶ Kentucky Pioneer Brief at 9-17.

⁷ KRS 278.702(1).

⁸ KRS 278.710(1)(e).

Commission (FERC) are generally exempt from local planning and zoning ordinances.⁹

However, Kentucky Pioneer's next assertion constitutes a leap of logic we cannot make. Kentucky Pioneer contends that, because the project proposed in Kentucky Pioneer's application will be considered an exempt wholesale generator subject to the jurisdiction of FERC,¹⁰ KRS 100.324 provides an exemption from a requirement that it comply with local planning and zoning regulations pursuant to KRS 278.710(1)(e).¹¹ Kentucky Pioneer's contentions do not meet basic principles of statutory construction. Based on those principles, the Board finds that, to the extent that the statutes conflict,¹² the requirements of the siting statute supersede the exemption allowed in KRS 100.324.

⁹ See KRS 100.324(1) [P]ublic utilities operating under the jurisdiction of the Public Service Commission ... or Federal Energy Regulatory Commission ... shall not be required to receive the approval of the planning unit for the location or relocation of any of their service facilities .

¹⁰ The term exempt wholesale generator means any person determined by the Federal Energy Regulatory Commission to be engaged in the business of owning or operating all or part of an eligible facility and selling energy at wholesale. 15 USCA 79z-5a.

¹¹ Section 10.3 of Application. Kentucky Pioneer asserts that the proposed project site is exempt from zoning constraints because utility structures (i.e. electric power generation) are excluded from zoning considerations.

¹² We do not, in fact, find that there is a conflict between KRS 278.710(1)(e) and KRS 100.324. The latter exempts Kentucky Pioneer from any requirement that it *receive the approval* of the planning unit for locating its facility (emphasis added). The former statute does not purport to require an applicant to receive planning unit approval; instead, it places jurisdiction in the Board to enforce planning and zoning requirements in effect on the date of the application.

Kentucky statutes are liberally construed to promote their objectives and carry out the intent of the Legislature.¹³ Indeed, when construing statutes, courts have a duty to ascertain the purpose of the General Assembly in enacting a particular statute and, once this purpose is ascertained, give effect to this legislative intent.¹⁴ When construing conflicting statutes, courts must ascertain and follow legislative intent.¹⁵ Courts may not presume that the General Assembly intended a useless or futile provision.¹⁶ Whenever possible, conflicting statutes should be construed together so as to give proper effect and meaning to both.¹⁷ However, when conflicting statutes cannot be reconciled, courts are guided by established rules of statutory construction.

Kentucky courts have long held that, when two statutes are in apparent conflict, the statute containing express and positive language regarding a particular subject should take precedence over a provision dealing with the same matter in more general terms.¹⁸ Thus, as between legislation of a broad, general nature on one hand, and legislation that deals minutely with a specific matter on the other, the more specific statute will prevail.¹⁹ In addition to favoring specific statutes over more general ones,

¹³ KRS 446.080.

¹⁴ City of Bowling Green v. Board of Education, 443 S.W.2d 243 (1969).

¹⁵ Smith v. Louis Berkman Co., 894 F. Supp.1084 (WD Ky 1995).

¹⁶ Id.

¹⁷ City of Bowling Green v. Board of Education, 443 S.W.2d 243 (1969).

¹⁸ Preston v. Floyd/Johnson County Pilots Association, 867, S.W.2d 474 (1993).

¹⁹ See also Reisinger v. Grayhawk Corporation, 860 S.W.2d 788 (Ky. App. 1993).

basic rules of statutory construction also provide that whenever statutes conflict on a particular subject and cannot be reconciled, the later statute controls.²⁰

Although a cursory reading of KRS 100.324 and KRS 278.710(1)(e) might indicate the existence of a statutory conflict, the Board finds that the two statutes are reconcilable. While KRS 100.324 exempts FERC-regulated utilities from needing zoning approval for the location of their service facilities, KRS 278.710(1)(e) requires the Board consider whether a merchant plant will meet all the local planning and zoning requirements that existed on the date that the application was filed with the Board. There is a distinct difference between a requirement that planning unit approval be obtained and a requirement that zoning regulations be met. Clearly, both statutes are applicable and reconcilable.

Even if KRS 100.324 did conflict with the siting statute, basic rules of statutory construction would demand that the siting statute prevail. The latter statute is both more specific and more recent. First, while KRS 100.324 refers generally to utility service facilities, the siting statute specifically defines and regulates merchant electric generation facilities. Second, because the siting statute was enacted after KRS 100.324, the Legislature clearly envisioned it as an exception to the more general provisions listed in KRS 100.324.

Kentucky Pioneer's argument in regard to its alleged lack of obligation to comply with planning and zoning regulations in effect on the date of its application is oddly circular. Kentucky Pioneer cites the Planning Commission's lack of jurisdiction over the proposed facility pursuant to KRS 100.324 and cites the jurisdiction of the Board to

²⁰ Butcher v. Adams, 310 Ky. 205, 220 S.W.2d 398.

determine whether it will comply with planning and zoning regulations pursuant to KRS 278.710(1)(e). However, while Kentucky Pioneer admits that it fails to comply with at least one of those regulations, it cites the Planning Commission's lack of jurisdiction to grant a variance and concludes that it need not comply with the regulation because it cannot obtain a variance. The Board does not, and cannot, accept this argument.

As Kentucky Pioneer asserted in its brief, it is well established that FERC's jurisdiction extends to the sale of energy generated by merchant facilities.²¹ Thus, any merchant plant subject to the siting jurisdiction of the Board will also be subject to the rate jurisdiction of FERC. To accept Kentucky Pioneer's interpretation of KRS 100.324 and KRS 278.710(1)(e) would be to conclude that, because merchant plants are exempt from zoning approval pursuant to KRS 100.324, the Board could never consider local planning and zoning requirements. Such an interpretation would render KRS 278.710(1)(e) absolutely meaningless. Established case law demands that the Board reject a statutory interpretation that renders any statutory provision a nullity. Thus, we reject Kentucky Pioneer's interpretation and find that to receive approval of its application, Kentucky Pioneer must, as it initially certified in its application, meet the zoning regulations of the Planning Commission in effect on the date the application was filed. It has not done so.

Land use in Winchester and Clark County is regulated by the Zoning Order enacted by the Clark County Local Planning Commission. In an effort to ensure the stable value of all permitted development, the Zoning Order establishes and regulates zoning districts throughout Winchester and Clark County. This Order explicitly provides

²¹ 16 USCA 824(a)-(d).

that all existing and future structures and uses within the City of Winchester and unincorporated area of Clark County shall conform with all applicable provisions of the Zoning Order.²² The Order further provides that, Each zoning district is established to permit only those uses specifically listed as permitted, except as provided under the nonconforming provisions, and is intended for the protection of those uses. No other uses are permitted except as provided elsewhere in this Zoning Order.²³

The area in which Kentucky Pioneer proposes to locate the merchant facility is zoned agricultural.²⁴ The Board has carefully reviewed the uses permitted in this area and finds that the type of uses associated with the construction and operation of a merchant facility are not permitted.²⁵ The Board is aware that EKPC currently operates a generation facility in the same area and considered whether the Kentucky Pioneer project might be granted a variance or considered a nonconforming use. However, the siting statute requires that the Board consider the ordinances that existed on the date that Kentucky Pioneer filed its application. Because any variance or nonconforming-use designation had not been granted as of December 19, 2002, and could only be granted at some point in the future, the Board cannot consider whether Kentucky Pioneer might receive some future variance or designation. Instead, the Board concludes, as it must on the record before it, that Kentucky Pioneer will not meet all the local planning and zoning requirements in effect on the date that it submitted its application.

²² Section 1.7 Zoning Order.

²³ Id.

²⁴ A-1 Zoning Map.

²⁵ Section 6.1 Zoning Order.

The Board is aware that the consideration of local planning and zoning requirements is one of nine criteria that it must consider before approving or denying a siting application. However, the Board believes that its enabling statutes emphasis on local concerns, together with the statute s legislative history, not only demonstrates the Legislature s commitment to local planning issues, but also requires the Board to carefully consider local concerns in rendering its decision. It is also crucial that, while compliance with zoning regulations appears only as a factor for consideration in KRS 278.710(1)(e), certification of compliance with those regulations appears as a filing requirement in KRS 278.706(2)(d). In short, absent certification of future compliance, an application for a merchant plant cannot even be reviewed. Clearly, the provision in KRS 278.706(2)(d) was meant to prevent the Board even from considering an application for a plant that would not be in compliance with zoning regulations. Only the fact that Kentucky Pioneer certified that it would comply brought us to this point in the proceedings.

The legislative history of the Board s enabling statutes emphasizes the importance attached by both Kentucky s Governor and its General Assembly to local concerns in construction cases of this nature. Prior to the enactment of these statutes, the siting of merchant plants like the proposed Kentucky Pioneer facility was completely unregulated in Kentucky. On June 19, 2001, in response to concerns about the environmental and aesthetic impacts caused by the development of these facilities, Governor Paul Patton issued a moratorium on permits for new merchant power plants.²⁶ The moratorium directed the PSC to review and study issues related to the

²⁶ Executive Order No. 2001-771.

development of merchant plants. On December 21, 2001, the PSC responded to this directive. With regard to the siting of merchant plants, the PSC found that the siting of merchant plants required a delicate balance to ensure that local interests are adequately protected.²⁷ The PSC further found that the siting of merchant facilities necessarily involves the consideration of local planning and zoning issues.²⁸ While the PSC recognized that these facilities operate under FERC's jurisdiction, the PSC noted that, since the Federal Power Act specifically prohibits FERC from asserting jurisdiction over generation facilities, this leaves the siting of merchant plants totally unregulated in Kentucky at this time.²⁹

Unsatisfied with the absence of regulatory guidelines applicable to the siting of merchant facilities, the General Assembly enacted the statutes creating this Board in April 2002. These statutes clearly demonstrate the General Assembly's intent to subject proposed merchant plants to local planning and zoning guidelines. As we have previously discussed, an applicant must certify compliance with all local planning and zoning guidelines before his application can even be considered.³⁰ Moreover, to ensure such compliance, KRS 278.702(1)(d)(1)(a) specifies that, if a planning commission has jurisdiction over the proposed construction site, the chairman of that planning commission must be appointed to the Board. To assert that KRS 100.324 exempts an

²⁷ Administrative Case No. 387, A Review of the Adequacy of Kentucky's Generation Capacity and Transmission System, at 84.

²⁸ Id. at 80.

²⁹ Id. at 83.

³⁰ KRS 278.706(2)(d).

applicant from local planning and zoning constraints is to ignore altogether the obvious intent of the General Assembly.³¹

While Kentucky Pioneer has met some of the criteria outlined in KRS 278.710, the Board ultimately finds as a matter of law that none of the evidence presented with regard to the remaining criteria can compensate for Kentucky Pioneer's failure to comply with local planning and zoning ordinances. The Board also notes with concern Kentucky Pioneer's repudiation of its own certification that it would comply with all planning and zoning regulations.³² Without that certification, the Board would have been prohibited by law from reviewing Kentucky Pioneer's application.³³ Kentucky Pioneer's certification has now, in essence, been withdrawn. It is extraordinary that Kentucky Pioneer can expect that same application to be approved.

³¹ The requirement that the Board hold a local public hearing upon request, see KRS 278.712, rather than holding all hearings in Frankfort, is yet more statutory evidence, if more were required, of the General Assembly's intention to give paramount importance to local concerns in cases of this nature.

³² Section 12, Kentucky Pioneer Application.

³³ KRS 278.706(2)(d).

CONCLUSION

For the foregoing reasons, the Board denies the application. However, it does so without prejudice. Should Kentucky Pioneer comply with existing zoning regulations within 6 months of the date of this Order, the Board will reconsider this application.

The Board, having reviewed the evidence presented in the record, and having been otherwise sufficiently advised, HEREBY ORDERS that Kentucky Pioneer's application for a certificate to construct a 540 MW electric generating facility in Clark County, Kentucky is denied.

Done at Frankfort, Kentucky, this 16th day of April, 2003.

KENTUCKY STATE BOARD ON
ELECTRIC GENERATION AND
TRANSMISSION SITING

/s/ Martin J. Huelsmann
Martin J. Huelsmann, Chairman

Gary W. Gillis

/s/ Robert E. Spurlin
Robert E. Spurlin

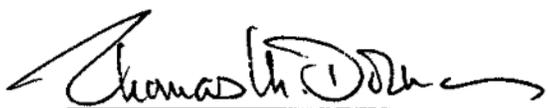
Henry List

/s/ J. R. Wilhite
J. R. Wilhite

/s/ John R. Maruskin
John Raymond Maruskin

/s/ James P. Kirby
James P. Kirby

ATTEST:



Executive Director
Public Service Commission
on behalf of The Kentucky State Board on
Electric Generation and Transmission Siting